

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRAD LEE KOLLER,

Defendant-Appellant.

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UNPUBLISHED

August 26, 2003

No. 239380

St. Joseph Circuit Court

LC No. 01-010602-FC

Before: Zahra, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), person under thirteen years of age, MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC II), person under thirteen years of age, MCL 750.520c(1)(a). He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of twenty-one years and ten months to fifty years for CSC I and seven years and four months to twenty-two years and six months for CSC II. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The victim, defendant's stepdaughter, testified that defendant inserted his penis into her vagina on the day in question and twice during the previous year. The victim's older sister testified that she discovered defendant and the victim in a bedroom closet. The victim was laying on the floor with her pants pulled down to her ankles and defendant was on his hands and knees over the victim, with his pants pulled down to his ankles. In his video-taped statement to the police, defendant admitted that he inserted his fingers and penis between the lips of the victim's vagina on the day in question and once during the previous year. An emergency room physician testified that a medical examination revealed that the victim's labia and vaginal opening were irritated, indicating that there was contact at the opening of the vagina.

Defendant first argues that the trial court abused its discretion in admitting into evidence a portion of the videotaped interview of defendant's confession to the police. The decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Defendant does not argue that the entire videotaped interview or other portions of it should have been admitted under the rule of completeness, MRE 106. Rather, he contends that the second part of the interview was improperly admitted because it was taken out of context with certain statements made in the first part of the interview, the latter of which the trial court properly determined was inadmissible. Defendant presents an argument to the effect

that, because the first part of the interview was inadmissible, the second part of the interview was inadmissible because its context rested solely on the first part of the interview. We disagree. MRE 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In *Moody v Pulte Homes, Inc*, 423 Mich 150, 161; 378 NW2d 319 (1985), our Supreme Court quoted with approval this Court's observation that MRE 106 was "designed to prevent unfairness which may result if a statement is taken out of context." This rule of evidence would only be pertinent if defendant sought, but was denied, permission to have a complete writing or recorded statement introduced. *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). MRE 106 does not have any bearing on the admissibility of the statement that the prosecution introduced. *Id.* Accordingly, MRE 106 would entitle defendant to request admission into evidence of the first part of the interview, or portions of it. The rule would not exclude the second part of the interview. Defendant does not argue on appeal that the trial court denied his request to admit certain statements from the first part of the interview. Thus, the trial court did not abuse its discretion in admitting into evidence the second part of the interview.

Defendant next argues that he was deprived of the effective assistance of counsel. In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*<sup>1</sup> hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant first asserts that his counsel failed to timely move to suppress the videotape and that in making the motion, counsel failed to provide complete information about exculpatory material or sufficient legal grounds for exclusion. We disagree. The record indicates that on the eve of the trial, counsel learned that the prosecutor planned to introduce the videotape. Defendant's counsel moved to suppress the videotape on the morning of the trial. The record shows that counsel adequately presented his argument and clearly drew the court's attention to the exculpatory portions in the first part of the interview.

Defendant next asserts that counsel failed to cross-examine the interrogating police officers on the exculpatory statements defendant made in the first part of the videotaped

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

interview. From our review of the record, we conclude that defendant fails to show how the statements at issue would have made a difference in the outcome of the trial.

Defendant next argues that counsel should have presented alibi and alternative defenses instead of arguing that defendant was guilty of the lesser offense of second-degree criminal sexual conduct. Where defendant admitted to the sexual contact in his written and videotaped statements, the decision to forego these alternative theories was not a tactical error. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Notably, defendant acknowledges that the defense admitting guilt to the lesser charge based on contact but no penetration was not per se ineffective assistance. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Defendant next claims that counsel erred in declining to voir dire the emergency room physician who examined the victim and in insisting that the physician testify in court in person. Defendant points to no information to suggest that the physician's expertise could have been successfully challenged through voir dire. Moreover, counsel took advantage of the physician's presence in court to cross-examine him and attempt to establish that there may have been other causes for the victim's genital irritation. Although unsuccessful, this objective was a sound reason for insisting on his presence.

Defendant next argues that his counsel failed to sequester the prosecutor's witnesses. Defendant argues that the physician was allowed in the courtroom during the entire second day of the trial. However, the record shows that the physician was the only witness that testified that day and thus, he did not hear any other person's testimony. Defendant also argues that the two officers who interrogated him should have been sequestered. Defendant merely asserts on appeal that the testimony the three men heard "was likely to have colored and compromised their own testimonies." Defendant does not provide this Court with any explanation to this conclusory remarks, and there is nothing in the record to indicate that the testimony of these men was influenced.

Finally, defendant argues that the trial was unreliable because of the cumulative effect of his counsel's trial errors. "[O]nly actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *Id.* at 591. Because we find no error, defendant's claim is without merit.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Donald S. Owens